United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

ORIGINAL

75-7247

To be argued by
WERNER WEINSTOCK

In The

United States Court of Appeals

For The Second Circuit

B

P/S

ROLAND A. DEXTER and JANE K. DEXTER,

Plaintiffs-Appellants,

vs.

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Defendant-Appellee.

BRIEF FOR DEFENDANT-APPELLEE

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OTHER AUTHORITIES

STATUTE INVOLVED

15 U.S.C. §1012 - The McCarran-Ferguson Act

§ 1012. Regulation by State law; Federal law relating specifically to insurance; applicability of certain Federal laws after June 30, 1948

(a) The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law. Mar. 9, 1945, c. 20, § 2, 59 Stat. 34; July 25, 1947, c. 326, 61 Stat. 448.

No. 75-7247

In The

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

ROLAND A. DEXTER and JANE K. DEXTER,

Plaintiff-Appellants,

against

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,

Defendant-Appellee.

APPELLEE'S BRIEF

STATEMENT OF THE CASE.

A. Proceedings in the Court Below.

Plaintiff herein filed in the Court below a Class Action Complaint for Damages and Declaratory Relief on January 3, 1972. By order dated March 28, 1973, the District Court denied plaintiffs' motion pursuant to FRCP 23 (c) (1) and that portion of the complaint purportedly alleging a class action was thereby dismissed.

In his memorandum and order dated March 14, 1975,

Levet, D. J.*, dismissed the complaint, holding "that this court lacks jurisdiction over the subject matter of plaintiff's claim."

B. Statement of Facts.

This is an antitrust action alleging violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1 and 2) and Section 3 of the Clayton Act (15 U.S.C. §14), to wit, Equitable attempted to monopolize a substantial portion of the life insurance market by tying mortgage loans to the mortgagor's purchase of life insurance. Plaintiffs state that in 1959, 1961 and 1968 they were required to purchase life insurance from defendant as a condition to obtaining mortgage loans.

QUESTION PRESENTED

Is the sale of a life insurance policy as security on a residential mortgage loan "the business of insurance", as contemplated in the McCarran-Ferguson Act?

ARGUMENT

Introduction

The McCarran-Ferguson Act, 15 U.S.C. §§1011-1015 (generally referred to as the "McCarran Act"), renders the federal antitrust laws inapplicable to the business of insurance to the extent such business is regulated by the states. This exemption applies when either or both of two kinds of state regulation

* Senior Judge, U. S. District Court for the Southern District of New York, sitting by designation.

is present. First, a state may regulate by statutorily proscribing certain conduct.* Second, a state may regulate by authorizing or regulating certain conduct.** Or, indeed, it may do both.*** In this case both kinds of regulation are present, although, it should be noted, either one would be sufficient in and of itself.

The McCarran Act was enacted by Congress in response to United States v. South-Eastern Underwriters Association, 322 U.S. 533 (1944), in which the Supreme Court overruled Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1869), and declared that "the business of insurance" was "commerce."

As the Supreme Court stated in tracing the genesis of the McCarran Act in SEC v. National Securities, Inc., 393 U.S. 453 (1969), Congress was "concerned about the inroads the Court's decision (in South-Eastern Underwriters) might make on the tradition of state regulation of insurance" (393 U.S. at 458). The McCarran Act, "the product of this concern" (Ibid.), clearly stated its purpose in its first section, in the Congressional declaration that

---

* See, e.g., FTC v. National Casualty Co., 357 U.S. 560 (1958); Ohio AFL-CIO v. The Insurance Rating Board, 451 F.2d 1178 (6th Cir. 1971), cert. denied, 409 U.S. 917 (1972).

** See, e.g., Holly Springs Funeral Home, Inc. v. United Funeral Service, Inc., 303 F.Supp. 128 (N.D. Miss. 1969); Miley v. John Hancock Mutual Life Insurance Co., 148 F. Supp. 299 (D.Mass.), aff'd per curiam on the opinion below, 242 F.2d 758 (1st Cir.), cert. denied, 355 U.S. 828 (1957).

*** See, e.g., Commander Leasing Co. v. Transamerica Title Insurance Co., 477 F. 2d 77 (10th Cir. 1973); California League of Independent Insurance Producers v. Aetna Casualty & Surety Co., 175 F.Supp.857 (N.D. Cal. 1959); Miley v. John Hancock Mutual Life Insurance Co., supra.

"the continued regulation and taxation by the several States of the business of insurance is in the public interest."

To effectuate that purpose, the Act further provided:

> "No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance . . . unless such Act specifically relates to the business of insurance: Provided, That after January 1, 1948 . . . the Sherman Act, . . . the Clayton Act, . . . (and) the Federal Trade Commission Act, . . . shall be applicable to the business of insurance to the extent that such business is not regulated by state law" (emphasis supplied).*

The Congressional purpose underlying the McCarran Act has been pointed to repeatedly by the Supreme Court. Thus, a year after the passage of the Act, the Supreme Court stated, in Prudential Insurance Co. v. Benjamin, 328 U.S. 408 (1946):

> "Obviously Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance. This was done in two ways. One was by removing obstructions which might be thought to flow from its own power, whether dormant or exercised, except as otherwise expressly provided in the Act itself or in future legislation. The other was by declaring expressly and affirmatively that continued state regulation and taxation of this business is in the public interest and that the business and all who engage in it 'shall be subject to' the laws of the several states in these respects."
>
> "Moreover, in taking this action Congress must have had full knowledge of the nation-wide existence of state systems of regulation and taxation; of the fact that they differ greatly in the scope and character of the regulations imposed and of the taxes exacted; and of the further fact that many, if not all, include features which, to some extent, have not been

* Act of March 9, 1945, ch. 20, 59 Stat. 33 (1945), 15 U.S.C. §§1011-15 (1958). A 1947 amendment, Act of July 25, 1947, ch. 326, 61 Stat. 448 (1947), changed the operative date to June 30, 1948.

> applied generally to other interstate business. Congress could not have been unacquainted with these facts and its purpose was evidently to throw the whole weight of its power behind the state systems, notwithstanding these variations" (328 U.S. at 429-30) (emphasis supplied).

See also Maryland Casualty Co. v. Cushing, 347 U. S. 409, 413 (1954); Monarch Life Insurance Co. v. Loyal Protective Life Insurance Co., 326 F.2d 841, 844 (2d Cir. 1963), cert. denied, 376 U.S. 952 (1964).

POINT I

THE FEDERAL COURT LACKS JURISDICTION OVER THE SUBJECT MATTER OF THIS SUIT BY VIRTUE OF THE McCARRAN ACT.

Appellee herein relies upon Addrisi v. The Equitable Life Assurance Society of the United States of America, 503 F. 2d 725 (9th Cir. 1974), cert. denied 420 U.S. 929 (1975). The courts in Addrisi were faced with a complaint similar to Dexters' on exactly the same fact pattern as the instant one. Addrisi urged that Equitable tied his residential mortgage loan to the purchase of an insurance policy, or in other words, Equitable required the purchase of a new Equitable policy in order to obtain a residential mortgage loan and that this violated the federal antitrust laws. The unanimous 9th Circuit clearly held that Equitable was engaged in the "business of insurance" and more precisely that the alleged conduct of Equitable was in "the relationship between an insurance company and its policyholder", which relationship was pervasively regulated by California. The court concluded, therefore, that the Addrisi complaint failed to state a claim upon which relief could be granted under the federal antitrust laws.

Quite apart from Addrisi, supra, the decision below should be affirmed, since the marketing of an insurance policy is the "business of insurance." It is the very sale of insurance which the complaint alleges violates the federal antitrust laws. If the marketing of insurance policies is not the "business of insurance," then what is the "business of insurance" in the context of the McCarran Act? The question needs no answer in view of the cases herein cited. An affirmance of the decision below would be in conformity with the sound interpretations of the McCarran Act.

As in Addrisi, supra, so here too, the marketing of life insurance as additional collateral security on a mortgage loan is involved and, similarly, Connecticut's statutory regulatory scheme is all pervasive. It lodges broad authority in the Commissioner of Insurance to examine into the affairs of any company doing business in the State (C.G.S.A. §38-7) and it also authorizes the Commissioner to order a company to discontinue any practice he deems illegal or improper (C.G.S.A. §38-8). These statutes were in effect during the period alleged in the complaint and gave the Commissioner authority to prohibit or permit the kind of activity alleged in the complaint. As they regulate the business practices of insurers, they shield defendant from the federal antitrust laws.

Addrisi, supra, cited particularly the California Unfair Practices portion of the Insurance Code in dismissing the complaint. Connecticut, too, has similar statutes (C.G.S.A. §§38-60-63) which, among other things, prohibit monopolistic practices by an insurer. They also authorize the Commissioner to examine into the affairs of

an insurer to determine if an unfair method of competition is being used and to take steps to have such method discontinued. In view of the existence of this type of legislation, applying the Addrisi rationale, the complaint should be dismissed, as Connecticut regulated the conduct complained of during the periods alleged in the complaint.

Appellants' reliance on Fry, et al v. John Hancock Mutual Life Insurance Company, 355 F. Supp. 1151 (N.D. Tex. 1973), is ill-founded since, by order dated June 5, 1975*, the court reconsidered defendant's motion to dismiss so much of the complaint as alleged violation of the Sherman Act and dismissed such portion of the complaint on the authority of Addrisi, supra. Fry, of course, involves an alleged tie-in of irrigation systems and credit life insurance.

Although the marketing of life insurance by Equitable as additional collateral security upon its residential mortgage loans has already been held to be "the business of insurance" in Addrisi, supra. Appellant continues to argue that it is not and goes on to cite the three following cases which lend no light to the subject.

Fortner Enterprises Inc. v. U. S. Steel Corporation, 394 U.S. 495 (1969), involving an agreement between defendants to force the plaintiff and others as a condition of obtaining credit to purchase at artificially high prices prefabricated houses manufactured by U. S. Steel, alleged violations of §§1 and 2 of the Sherman Act. In view of the fact that the marketing of Dexter's life insurance policy is clearly "the business of insurance," Fortner

* A copy of Judge Woodward's order entered June 5, 1975 is attached.

is inapplicable on the basis of the McCarran Act.

In SEC. v. Variable Annuity Life Insurance Company, 359 U.S. 65 (1959), the Supreme Court had before it the then brand new "variable annuity" contracts and held that these were securities which must be registered with the Securities and Exchange Commission under a certain law and are subject to regulations under another law because these contracts are not "insurance" policies or "annuity" contracts.

Once again, American Life Insurance Company v. Planned Marketing Associates, Inc., 389 F. Supp. 1141 (E.D. Va. 1974), dealt with something other than "the business of insurance", to wit, inducing plaintiff's agents to cease selling plaintiff's policies and to utilize plaintiff's trade secrets and customer lists.

Not one of these cases, upon which appellant relies, runs contrary to the Supreme Court's denial of certiorari in Addrisi or the 9th Circuit's unanimous decision in Addrisi that the marketing of Equitable's Assured Home Ownership Plan was "the business of insurance" and actionable under the federal antitrust laws.

POINT II

A COMMODITY UNDER THE CLAYTON ACT IS NOT INVOLVED IN THIS CASE.

Title 15 United States Code §14, known as Section 3 of the Clayton Act, reads in part as follows:

> "It shall be unlawful for any person engaged in commerce, in the course of such commerce to lease or make a sale or contract for the sale of

> goods, wares, merchandise, machinery, supplies or other commodities . . . where the effect of such lease, sale or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce." (emphasis supplied).

A transaction involving a loan of money is not a lease, sale, or contract for the sale of a commodity as those terms are used in the Clayton Act. Nor is money, the only thing involved in the alleged transactions, a commodity, goods, wares, merchandise, machinery or supplies as those terms are used in the Clayton Act. United States v. Investors Diversified Services, Inc. 102 F. Supp. 645 (D. Minn., 1951).

The word "commodity" as used in the Clayton Act is restricted to produce, merchandise or other tangible goods. Bernard N. Baum, et al v. Investors Diversified Services, Inc., 409 F. 2d 872 (7th Cir., 1969). One of the more recent cases of this line of decisions is Gordon v. New York Stock Exchange, 366 F.Supp. 1261 (S.D.N.Y.1973) where the plaintiff brough suit under the Robinson-Patman Act claiming price discrimination by the Stock Exchange and other defendants against small investors in discounting for volume purchases. In dismissing the suit the court held that services - stock trade executions - are not commodities within the purview of the statute, citing Baum, supra.

Consequently, the allegations of the complaint fail to state a claim under the Clayton Act.

POINT III

THIS ACTION IS TIME BARRED AS TO THE 1959 AND 1961 TRANSACTIONS.

Title 15 United States Code §15b pertaining to limitation of actions in federal antitrust actions states in part:

> "Any action to enforce any cause or action under Section 15 or 15a of this Title shall be forever barred unless commenced within four years after the cause of action accrued . . ."

It is well settled that a cause of action under the federal antitrust laws accrues and the statute of limitations begins to run when the defendant commits an act which injures the plaintiff. Each time the plaintiff is injured by an act of the defendant a cause of action accrues to the plaintiff and as to the damages resulting from that act the statute of limitations begins to run from the commission of that act. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 915, S. Ct. 759, 28 L.Ed. 2nd 77 (1971).

To the extent that the complaint purports to allege causes of action based on real estate mortgage transactions taking place on March 1, 1959 and March 14, 1961, four years passed since the accrual of said causes of action and the commencement of this action, and, therefore, they are barred by law.

POINT IV

PLAINTIFF CANNOT ASSERT A CAUSE OF ACTION AT VARIANCE WITH THE 1968 WRITTEN AGREEMENT

The written mortgage commitment for the 1968 transaction stated that the purchase of life insurance from Equitable was not a

condition to the granting of the mortgage. Plaintiff, an attorney, signed this agreement with full knowledge of its contents and cannot now come into court to assert that this was not the understanding between the parties. In 28 Am. Jur. 2d Estoppel and Waiver, Section 66 it is stated:

> "It is a general rule that one who is able to read a written instrument which is presented to him, and has an opportunity to do so, is estopped from denying that he knows of the contents thereof, and is bound thereby, if he negligently signs, accepts, or acts upon it without actually reading it."

CONCLUSION

FOR THE VARIOUS REASONS SET FORTH, THE JUDGMENT DISMISSING THE COMPLAINT SHOULD BE AFFIRMED.

RESPECTFULLY SUBMITTED,

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Of Counsel

"ORDER MODIFYING PREVIOUS ORDER" IN FRY, et al v. JOHN HANCOCK MUTUAL LIFE INSURANCE COMPANY

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS

AMARILLO DIVISION

- -x

DeWAYNE FRY, et al.,

Plaintiffs,

v.

CIVIL ACTION NO.
CA-2-1301

JOHN HANCOCK MUTUAL LIFE
INSURANCE COMPANY,

Defendant.

- -x

ORDER MODIFYING PREVIOUS ORDER
AND AS TO DEFENDANT'S MOTION FOR
SANCTIONS

On the 22nd day of May, 1975, the court entered its order to the effect that defendant's motion for judgment on the pleadings dismissing Part No. Two of the amended complaint was carried along with the trial of this case and that defendant's motion for partial summary judgment on its counterclaims against various plaintiffs was granted. The court has reconsidered defendant's motion asking for dismissal of Part No. Two of the amended complaint, the briefs and arguments contained therein filed in support of such motion and in opposition thereto, and,

at the oral request of counsel for plaintiffs has also reconsidered paragraph 3.) of the above order granting defendant's motion for partial summary judgment. Further, the court has considered defendant's motions for sanctions and will here enter a preliminary order pertaining to same.

Part No. Two of plaintiffs' amended complaint is divided into two counts. Count one alleges defendant violated the Sherman Act by allegedly defendant violated the Sherman Act by allegedly foreclosing competition in the credit life insurance business by not allowing plaintiffs the free choice to decide from whom they would receive such insurance. Such an allegation focuses on the relationship between an insurance company and its policyholder and would, therefore, be governed by the McCarran-Ferguson Act. S.E.C. v. National Securities, 393, U.S. 453 (1969).

Count two of Part No. Two of the amended complaint alleges defendant violated the Sherman Act by allegedly coercing plaintiffs to purchase life insurance to obtain mortgage loans. The Ninth Circuit was faced with essentially this same allegation and found same to be within the ambit of the McCarran-Ferguson Act. Addrisi v. Equitable Life Assurance Society,

503 F.2d 725 (9th Cir. 1974), cert. denied, ____ U.S. ____.

It appears to the court, in view of the above authorities, that paragraph 2.) of the court's order entered on May 22, 1975, should be modified and, accordingly, it is ORDERED that paragraph 2.) of the court's order entered on May 22, 1975, be modified to the effect that defendant's motion for judgment on the pleadings dismissing Part No. Two of the amended complaint is GRANTED and Part No. Two of the amended complaint is hereby DISMISSED.

In paragraph 3.) of the court's order entered on May 22, 1975, defendant's motion for partial summary judgment on its counterclaims was granted. Counsel for plaintiffs has by telephone communication requested that the court reconsider such order and grant additional time in which plaintiffs might respond to such motion. The court is of the opinion that in the interest of justice such additional time should be granted. Therefore, it is ORDERED that paragraph 3.) of the court's order entered on May 22, 1975, be modified to the effect that the granting of defendant's motion for partial summary judgment be withdrawn. Plaintiffs will respond to such motion on or before June 17, 1975, at which time such

motion will again be considered. If plaintiffs do not respond within the above prescribed time, the court's previous order granting defendant's motion for partial summary judgment will be reinstated and appropriate judgments will be entered.

Further, the court has considered defendant's motions for sanctions against various plaintiffs in this case. Counsel for plaintiffs, by telephone communication, has assured the court that compliance with those matters complained of in such motions can be accomplished in a two week period and that he would further communicate this assurance to counsel for defendant. It is, therefore, ORDERED that plaintiffs against whom defendant's motions for sanctions are addressed will answer or otherwise respond to the interrogatories which defendant alleges in its motions to be insufficient and comply with the defendant's request for production of documents in the manner prescribed by such request on or before June 17, 1975. The court notes that a substantial amount of time has passed in which such plaintiffs have neglected to comply with the discovery efforts of defendant set out in such motions and failure of those plaintiffs to which defendant's motions for sanctions are addressed to fully comply with this order

within the prescribed time will result in the dismissal of their claims in this case.

The Clerk will furnish a copy hereof to each attorney.

ENTERED this 5th day of June A.D. 1975.

HALBERT O. WOODWARD

HALBERT O. WOODWARD
United States District Judge

U.S. DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
FILED
JUNE 5, 1975
JOSEPH McELROY, JR., CLERK.
By_____
Deputy.

A 201 Affidavit of Service by Mail — LUTZ APPELLATE PRINTERS, INC.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ROLAND A. DEXTER, et ano.,

Plaintiffs-Appellants,

- against -

THE EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

Defendant-Appellee.

Index No.

Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Eugene L. St. Louis *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 1235 Plane Street, Union, N.J. 07083

That on the 23d *day of* July *19* 75, *deponent served the annexed* Appellee Brief *upon* Roland A. Dexter *attorney(s) for* Appellants *in this action, at* 18 Silverbrook Rd., Westport Ct. 06880

the address designated by said attorney(s) for that purpose by depositing 2 *true copy* es *of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.*

Sworn to before me, this 23d *day of* July *19* 75

Robert T. Brin

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 19[illegible]

Eugene L. St. Louis

Print name beneath signature

EUGENE L. ST. LOUIS